

Blocking of ITC u/s 86A is possible only when the officer has a strong case; opportunity of being heard has to be provided to the taxpayer also

By: Team Tax Connect

Recently, the Hon'ble Supreme Court of India vide its decision dated 13.03.2023 in the case of State of Karnataka Versus M/s Ecom Gill Coffee Trading Private Limited [CIVIL APPEAL NO. 230 OF 2023 (Arising from SLP (Civil) No. 2572/2022)] - 2023-VIL-20-SC in paragraph Nos.14 and 15 held as under:

"..While claiming ITC as per section 70 of the KVAT Act, 2003, the purchasing dealer has to prove the genuineness of the transaction and as per section 70 of the KVAT Act, 2003, the burden is upon the purchasing dealer to prove the same while claiming ITC.

In view of the above and for the reasons stated above and in absence of any further cogent material like furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. and the actual physical movement of the goods by producing the cogent materials, the Assessing Officer was absolutely justified in denying the ITC, which was confirmed by the first Appellate Authority..."

This decision of The Hon'ble Apex Court has given strength to GST department cases wherein there is allegation of non-compliance of 16(2)(b) of The CGST Act i.e. goods have not been actually received by the recipients and consequently ITC is denied. This is the allegation in 'fake invoicing cases' wherein the recipient has to prove that he has received the goods. In these cases it is generally seen that ITC is blocked under Rule 86A of CGST Rules which provides as follows –

"(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

i. issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

ii. without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount..."

In this regard, the twin conditions as follows have to be satisfied u/s 86A before blocking ITC –

1. The 'reasons to believe' have to be on the basis of material evidence available or gathered in relation to fraudulent avilment of input tax credit or ineligible input tax credit availed as per the conditions/ grounds under sub-rule (1) of rule 86A.

2. Such Reasons to believe "*shall be duly recorded by the concerned officer in writing*" on file, before he proceeds to disallow debit of amount from electronic credit ledger of the said person.

The Circular dated 02.11.2021 by The CBIC requires as follows -

"3.1.4 It is reiterated that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case it important to determine case(s) tit for exercising power under rule 86A.

The remedy of disallowing debit of amount from electronic credit ledger being, by its very nature, extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution. It contemplates an objective determination based on intelligent care and evaluation as distinguished from a purely subjective consideration of suspicion. The reasons are to be on the basis of material evidence available or gathered in relation to fraudulent availment of input tax credit or ineligible input tax credit availed as per the conditions/grounds under sub-rule (1) of rule 86A.

3.3.1 The amount of fraudulently availed or ineligible input tax credit availed by the registered person, as per the grounds mentioned in sub-rule (1) of rule 86A, shall be prima facie ascertained based on material evidence available or gathered on record. It is advised that the powers under rule 86A to disallow debit of the amount from electronic credit ledger of the registered person may be exercised by the Commissioner or the officer authorized by him, as per the monetary limits detailed in Para 3.2.1 above. The officer should apply his mind as to whether there are reasons to believe that the input tax credit availed by the registered person has either been fraudulently availed or is ineligible, as per conditions/grounds mentioned in sub-rule (1) of rule 86A and whether disallowing such debit of electronic credit ledger of the said person is necessary for restricting him from utilizing/passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue. Such "Reasons to believe" shall be duly recorded by the concerned officer in writing on file, before he proceeds to disallow debit of amount from electronic credit ledger of the said person."

Hence where the documents have been made available by the taxpayer, then the officer has to make a strong case in writing before blocking ITC. Further, an opportunity of being heard has to be provided to the taxpayer held the Hon'ble Telengana High Court in the case of M/s SRI KRISHNA ENTERPRISES Vs THE SUPERINTENDENT OF CENTRAL TAX [2023-VIL-821-TEL].

LET'S DISCUSS FURTHER!

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